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IN THE

Supreme Court of the United States

CHARLES A. CHASE,
Appellant,

against

EMIL WETZLAR and WILLIAM P. BONN, Alien Subjects of the EMPEROR OF GERMANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ARGUMENT.

POINT I.

The appeal should be dismissed because the jurisdiction of the Court below was never in question within the meaning of the Act of March 3rd, 1891, under which this appeal is taken.

The Trial Court did not hold that it had no jurisdiction of this cause, owing to its lack of author-

ity as a Federal Court of limited jurisdiction. No question was raised by defendant of the Court's authority to act as a judicial tribunal, provided complainant proved the necessary and requisite facts existed to give the Court power to act in the premises. If complainant had proved that the property in question was within the territorial jurisdictional limits of the Court, the Court would undoubtedly have proceeded to adjudicate the rights of the parties to the same; but the complainant failed and omitted to prove his case, and the Court, not because of its limitations as a Federal Court, but simply as an ordinary judicial tribunal, dismissed his Bill for lack of proof.

It is hard to see, therefore, where the jurisdiction of the Court, *as a Federal Court*, is in question, and it is settled that it is only where this question has been raised that an appeal will lie to this Court.

As this Court held, in the leading case of *Louisville Trust Co.* v. *Knott*, 191 U. S., 225:

> "The question of jurisdiction which the statute permits to be certified to this Court directly must be one involving the jurisdiction of the Circuit Court as a Federal Court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other" (page 233).

And in *Bache* v. *Hunt*, 193 U. S., 523, at p 525:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to bringing in par-

> ties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the Act of March 3rd, 1891, provides may be certified to this Court directly, must be one involving the jurisdiction of the Circuit Court as a Federal Court. *Louisville Trust Co.* v. *Knott*, 191 U. S., 225; *Blythe* v. *Hinckley*, 173 U. S., 501. Tested by this rule our jurisdiction fails, and the appeal must be dismissed."

And in

> *U. S.* v. *Larkin*, 208 U. S., 333 (Headnote 3);
>
> "* * * where the plea to the jurisdiction is simply whether the particular Court has jurisdiction, by reason of the locality in which the goods were seized, the question involved is not the jurisdiction of the United States court as such, and the question cannot be certified to this Court under Section 5 of the Judiciary Act of 1891; but the case is appealable to the Circuit Court of Appeals."

and to same effect

> *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S., 175.

As well might a party argue that the jurisdiction of the Court was at issue where he failed to properly file his pleading, and was adjudged in default, or where the Court or a Jury found he had not proved his case.

It is respectfully submitted, therefore, that the only question decided by the Court below was a

question of practice, and the only adjudication was, that one of the parties to a cause had neglected to prove his case, and that his Bill should therefore be dismissed, but not because the Court could not grant him the relief he sought, had he proved the facts set forth in his Bill of Complaint; on the contrary, it assumed full jurisdiction and completely decided the matter before it by dismissing complainant's Bill upon his failure to prove the material and essential allegations set forth therein, under which he had invoked the Court's jurisdiction and brought the defendant into Court. That upon complainant's failure to prove his case, his Bill would have been dismissed whether the case had been brought in any other Court than the Circuit Court, and that the Trial Court would have made the same disposition of the cause sitting as any other Court other than the Circuit Court, requires no argument.

The appeal, therefore, is improperly before this Court and should be dismissed.

POINT II.

The appeal should be dismissed because even assuming that the jurisdiction of the Court within the Act of March 3rd, 1891, was in issue at one stage of the proceedings, it was finally disposed of by the decision of Judge Lacombe from which decision the complainant has never appealed.

The sufficiency of the plea (which is the only question in any way involving the jurisdiction of the Circuit Court) is no longer open to question by this complainant.

After the filing of the plea, the complainant noticed the plea for argument, as to its sufficiency, which argument was duly heard before Judge LACOMBE, who rendered the Opinion set forth on page 44 of the Record, and thereafter and on April 17th, 1911, an Order was duly made by the Court whereby it was

> "ORDERED AND DECREED by this Court that the said plea is sufficient in law and in form and that the complainant be allowed to file his general replication thereto" (Record, p. 45).

No appeal was taken by complainant from this Order, so that when the proceeding was brought on for Hearing by complainant filing his general replication (Record, p. 46), this Order was unmodified, in full force and effect, and binding on the

Court, and it is submitted, therefore, that in so far as the parties to this action are concerned, the sufficiency of the plea, and, therefore, the whole question of jurisdiction is *res adjudicata* and no longer open to question.

And as the burden of proving or disproving the plea cannot possibly raise a question of law as to jurisdiction, there is no question of jurisdiction for this Court to decide.

POINT III.

Even if it be held that this case involves a question of jurisdiction within the Act of March 3rd, 1891, and that that question is open on this appeal, the appeal must none the less be dismissed, because such jurisdictional question is not the only question involved.

A. AN INSPECTION OF APPELLANT'S BRIEF ALONE DISCLOSES ONE OTHER QUESTION.

Were it not for the fact that the Trial Court has seen fit to grant the certificate stating that the only question involved is a jurisdictional one, this point might be sufficiently proved by directing the Court's attention to subhead 'b' of Point II of the *appellant's* brief. Not a syllable of this subhead relates to the Court's jurisdiction. It relates entirely to a question of burden of proof and contains at the beginning of the second paragraph, page 16 of the appellant's brief, the following statement:

> "The sole question at the hearing was and now on appeal is: On which party rested the burden of proof with respect to the facts alleged in the plea."

This statement is perfectly true, the respondent heartily concurs in it, and it is conclusive against the appellant.

B. AN EXAMINATION OF THE RECORD DISCLOSES STILL OTHER QUESTIONS.

As a matter of fact no matter which way the question of jurisdiction be resolved, one or the other of several non-jurisdictional questions must still be decided.

1. If the plea be good, then it must be determined whether it is an affirmative or a negative plea, and therefore whether the burden of offering proof was upon the appellant or the respondent. For, if the burden was upon the respondent, the judgment should have been against him, notwithstanding that there would have been a lack of jurisdiction had he proved his case. This alone is sufficient to defeat this appeal, but

2. If the plea be bad, then the question of the burden of proof falls, but there remain other questions to which the Court's attention is respectfully directed. Upon the Hearing, the defendant raised the question of the power of the Court to act because the defendants are sued as individuals whereas the property sought to be affected is held by them as executors (Record, p. 49), and also the lack of power in the Court to grant the relief demanded in the bill, namely, the immediate possession of 1/3 of 1/6 of the estate in question. The

Court below declined to pass on these questions, however, holding that its decision on the question of the burden of proof rendered consideration of these further questions unnecessary (Record, p. 49). But the defendant has raised these questions, they have never been decided against him, and he cannot be deprived of the benefit of a decision upon them, and if the Court upon this appeal may go into the merits of them, it is respectfully referred to Point VI *post*.

C. It is self-evident that the certificate of the court below certifying that a question of jurisdiction alone is involved on this appeal, is not conclusive.

POINT IV.

The Circuit Court was without jurisdiction of the above-entitled cause.

A. The Court had control neither of the person of the defendant nor of the property sought to be affected.

It is to be noted that complainant concedes that a personal judgment cannot be rendered against the defendant. (Appellant's brief, pages 9 and 13.)

The jurisdiction of the Court over this cause being claimed solely by virtue of Section 738 of the Revised Statutes as re-enacted by Section 8 of Act of March 3rd, 1875, c. 137, 18 Stat., 572, U. S. Comp. Stat., 1901, p. 513, the essential portions of which are as follows:

"When in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property *within the district where such suit is brought*, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons *in possession or charge of said property*, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the Court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the Court, in its discretion, and upon proof of the service of publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the Court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner, as if such absent defendant has been served with process within the said district; *but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit under the jurisdiction of the Court therein, within such district*" (italics ours).

and no personal service having been effected, and the defendant not having appeared generally in the

action, it was absolutely essential that proof should have been made to the Court that the property, which was the subject of the suit, was under the jurisdiction of the Court, and located within the district, for under the very terms of the Act, the Court's

> "* * * Adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the Court therein, within such district." Sec. 738 (*supra*).

or as this Court held in *Freeman* v. *Alderson*, 119 U. S., 185;

> "The State has jurisdiction over property within its limits owned by non-residents, and may, therefore, subject it to the payment of demands against them of its own citizens. It is only in virtue of its jurisdiction over the property, as we said on a former occasion, that its tribunals can inquire into the non-resident's obligations to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the non-resident possesses no property in the State, there is nothing upon which its tribunals can act. *Pennoyer* v. *Neff*, 95 U. S., 714, 723" (at p. 188).

And as said by the Court in *Cella Commission Co.* v. *Bohlinger*, 147 Fed. Rep., 419:

> "No State has any jurisdiction of persons or of property beyond its territorial limits (*Story's Conflict of Laws*, c. 2; *Wheaton's International Law*, pt. 2, c. 2) although it may often affect persons beyond its boundaries by virtue of its jurisdiction over their property within them and property without

> its limits by reason of its jurisdiction over the persons within them who own it" (at p. 421),

and at p. 422:

> "A State has jurisdiction of the property within its boundaries and to the extent necessary to justly apply that property it may by attachment thereof before hearing and by a substituted service of a summons upon its owner vest in its Courts the power to render a judgment against the owner by virtue of which the attached property and that property only may be seized and administered by its Courts. No property was attached in this case, however, and no jurisdiction was acquired by the Court below in this way,"

or as held in the New York Court of Appeals in the case of *Ward* v. *Boyce*, 152 N. Y., 191:

> "A party cannot be deprived of property without due process of law, and that term, in its application to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. If the proceedings involve the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the State, or voluntary appearance. If it be a proceeding in *rem*, the *res* must have been seized or attached, or at least must be within the jurisdiction." (At pp. 195-196.)

and someone had to prove to the satisfaction of the Court that these facts existed, for the Circuit Court could not presume it had jurisdiction over this case from the mere averments of the Bill.

for

> "* * * * the Circuit Courts of the United States possess no powers except such as the Constitution and the acts of Congress concur in conferring upon them, and the legal presumption is that every case is without their jurisdiction until the contrary affirmatively appears. No doubt can exist as to the correctness of this principle."
>
> *U. S.* v. *Southern Pac. R. R. Co., et al.*, 49 Fed., 297, at p. 300.

And while it may be true that before the Act of March 3rd, 1875, determining the jurisdiction of the Circuit Court of the United States was passed, the objection of the lack of jurisdiction of the Court was a very technical one, and could be raised only in a particular way and at a particular time, *Nashua Railroad* v. *Lowell Railroad*, 136 U. S., 356, where this Court said, at p. 373:

> "This rule is modified by the act of March 3rd, 1875, determining the jurisdiction of the Circuit Court of the United States. 18 Stat., 472. That statute provides that if in any suit commenced in one of such Courts 'it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may re-

> quire, and shall make such order as to costs as shall be just.' "

or as the Court said in *Oregon R. & Navigation Co. v. Shell*, 143 Fed., 1004, at p. 1005:

> "The Act of Congress defining the jurisdiction of the United States Circuit Courts comprehends both law and equity cases, and makes the same limitation with respect to the amount involved applicable to both systems of jurisprudence, and the Courts are required to apply the same technical rules in equity cases that are applied in actions at law for the purpose of being assured of jurisdiction, and the appellate courts do not hesitate to reverse decrees and judgments when jurisdiction has been exercised by the Circuit Courts if the jurisdictional facts do not appear affirmatively in record. It is true, as shown by the brief of counsel for the complainant, that by collusion of parties causes were litigated in the Federal Courts which were not in fact cognizable therein, and such abuses led to an amendment of the law, whereby the Courts are required to dismiss or remand a case whenever satisfied that it does not really involve a controversy within its jurisdiction; *and it is my opinion that the Court must be so satisfied when a fact essential to the jurisdiction, averred in the pleading of the party invoking the jurisdiction, is controverted by the pleading of the opposite party, and the affirmative averment is not supported by evidence. This must be so, because it is illogical to cast the burden of proof upon the party having the negative side of a material issue.*
>
> The case of *Anderson v. Watts*, 138 U. S., 694, 701, 11 Sup. Ct., 449, 450, 32 L. Ed., 1078, relied upon by complainant's counsel in their argument, does not appear to me to support their contention that the burden of

proof rests upon the defendants to disprove the averments of the bill with respect to jurisdictional facts, nor to deny the duty of the Court to dismiss a case for want of jurisdiction which has been submitted without proof to sustain essential averments traversed by an answer. In its opinion in that case, the Court said: 'Although the averment as to citizenship may be sufficient, yet, if it appear that the averment is untrue, it is the duty of the Circuit Court to dismiss the suit; and this Court, on appeal or writ of error, must see to it that jurisdiction of the Circuit Court has in no respects been imposed upon.'

If an inference might be drawn from the quoted sentence detached from the body of the opinion that the duty of the Court to dismiss would arise only when it shall be made to appear affirmatively that an averment of a jurisdictional fact is untrue, nevertheless any such inference is unwarranted after due consideration of the opinion in its entirety. That case was a suit in equity, and the Court held that since the Act of 1875 the defendant in an equity case is not restricted by the rules of equity practice to a demurrer or plea as the only means available to test the jurisdiction of a Circuit Court, but may make objection to the exercise of jurisdiction in the answer; and the opinion reiterates what has been frequently declared by the Supreme Court.

'The jurisdiction of the Circuit Court is limited, in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that the case is without its jurisdiction unless the contrary affirmatively appears.'

It is my opinion that this presumption of a lack of jurisdiction must be controlling when the pleadings make an issue as to any fact essential to jurisdiction, and there is no

> *evidence to sustain the affirmative allegation of such fact.*" (Italics ours.)

and in *Klenk v. Byrne*, 143 Fed. Rep., 1008, at p. 1009,

> "Formerly, in the practice of the federal courts, jurisdiction of a case commenced originally in a Circuit Court of the United States attached if the bill of complaint contained sufficient averments of the jurisdictional facts, and to oust the court of jurisdiction the defendant was required to contest the jurisdiction by a special plea; *but under the statutes now governing the practice the federal courts are required on their own motion to disclaim jurisdiction at any stage of a case, if satisfied that any essential fact does not exist.* Therefore, whenever the record shows upon its face that there is a controversy as to a jurisdictional fact, the court must require proof to support a finding to eliminate such question, *or else assume that it does not have jurisdiction.*" (Italics ours.) (At p. 1009; citing cases.)

That the Court below was so "satisfied" and did "require proof" is shown by its Opinion (Record, page 48):

> "If in this case, for example, the defendant had filed an answer denying the jurisdiction of the Court, instead of a plea in bar, the complainant on the trial would unquestionably have been required to give testimony to show, either that the defendant was an inhabitant of the district, or that property was held therein for and on his account as executor of the Wetzlar Estate."

and no proof having been furnished it, it properly "assumed" it had no jurisdiction.

for

> "By filing his plea, directed to a particular allegation in the bill which in fact is one in relation to which the complainant has the affirmative of the issue, the burden of proof is not transferred" (Record, p. 48).

This, of course, in no way conflicts with the cases of *Wetmore* v. *Rymer*, 169 U. S., 115; *Hunt* v. *N. Y. Cotton Ex.*, 205 U. S., 322, cited by appellant in his brief at pp. 17 and 18, and that line of cases.

In those cases there is no dispute as to the Court's jurisdiction over the parties to the cause, or over the subject matter thereof; the question being simply whether the requisite sum or value is in controversy, and the Courts have properly held that the absence of that ground of jurisdiction must be shown to a legal certainty; and necessarily so, for the claim of the complainant in those cases as set forth in his Complaint, is in itself one of the elements of the controversy and performs an evidential office, and when it is disputed by the defendant it merely furnishes proof of the existence of a controversy over the sum demanded, over the amount thereof, and not over the subject matter itself.

Furthermore, many of those cases involve property or property rights of no fixed measure or value, resting largely on estimate or opinion, and therefore difficult of accurate ascertainment, or the measure of value itself is in dispute.

In other words, in all those cases all the elements of a controversy exist which the Court, having jurisdiction of the parties and of the subject matter will proceed to adjudicate upon the merits.

It is respectfully submitted, however, that these

considerations cannot and do not apply to a case where the jurisdiction of the Court over the subject matter itself, and to each and every part thereof is in issue, where the Court has not acquired jurisdiction over the person of the defendant, and where the authority of the Court to proceed has been questioned *ab initio*.

B. THIS PROCEEDING BEING IN THE NATURE OF A PROCEEDING *in rem*, THE SITUS OF THE PROPERTY IS WHERE IT IS ACTUALLY LOCATED.

That this is a proceeding in *rem*, or if not strictly in *rem*, at least *quasi in rem* is conceded by complainant. (Appellant's brief, page 13.)

This Court, in case of *Freeman* v. *Alderson*, 119 U. S., 185, in referring to such actions, stated:

> "There is, however, a large class of cases which are not strictly actions in *rem*, but frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated" (at p. 187).

The property, however, must be "attached"; *Williams* v. *Benedict*, 8 How., 107, cited by appellant as the sole authority for the proposition:

> "This determines the law to be that the assets of a decedent's estate must be regarded in the eye of the law as in the possession of the court approaching the executor. His possession in the possession of the court, as the possession by a receiver is the possession of the court" (appellant's brief, p. 11).

is, to say the least, far from any such general authority.

That case, it is respectfully submitted, merely holds that under a peculiar statute of Mississippi relative to insolvent estates, one creditor cannot seize the whole in satisfaction of its debts. The quotation by complainant on page 11 of his brief being predicated on a statement immediately preceding it to the effect that the estate being insolvent, the probate court had ordered it "to be sold for the purpose of an equal distribution among all the creditors." The Court's opinion begins as follows:

> "The only question raised in this case depends on the construction of the peculiar statutes of Mississippi. It is, whether a plaintiff who has obtained judgment against the administrator of an intestate's estate, before it has been declared insolvent, has such a prior lien on the same as will entitle him to issue an execution and satisfy his judgment out of the assets, *after the estate has been declared insolvent by the Orphans' or Probate Court, and Commissioners appointed for the purpose of distributing the assets equally among all the creditors.*" (Italics ours.)

And the statement in appellant's brief, at page 12,

> "This case has been followed by numerous others, among which is *Yonley* v. *Lavender*, 21 Wall., 276 (1874),"

is hardly a correct one, for the *Yonley* case, the only one cited, is expressly based on the Statutes of Arkansas in reference to its Probate Courts, this Court saying:

> "The administration laws of Arkansas are not merely rules of practice for the Courts, but laws limiting the rights of parties, and will be observed by the Federal Courts in the enforcement of individual rights. These laws, on the death of DuBose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the State and placed it in the hands of a trustee for the benefit of creditors and distributees. It was thereafter in contemplation of law in the custody of the Probate Court, of which the administrator was an officer, and during the progress of administration was not subject to seizure and sale by anyone. * * * How can he account for the assets of the estate to the Court from which he derived his authority if another Court can interfere and take them out of his hands?" (at page 280).

The case at bar being a general one, however, and not based on any peculiar or local statute, and the property in dispute not being in the physical possession of any officer of the Court, or for that matter, of any person over whom the Court had personal jurisdiction, the Court was bound to apply the ordinary and general rule of law, namely: that the situs of personal property for the purpose of a proceeding in *rem* is in the State or country where it is actually located.

Parmele's Wharton on Conflict of Laws
(3rd Edit.), Vol. 1, Sec. 368 B.

C. APPELLANT'S CONTENTION THAT THE SURROGATE'S COURT OF NEW YORK COUNTY IS WITHOUT JURISDICTION TO DETERMINE "A DISPUTED QUESTION OF DISTRIBUTION" IS UNFOUNDED.

Defendant, as executor, will in due course and at the proper time account for his stewardship in the proper tribunal. Delay in such accounting has been largely due to the pendency of proceedings brought by this defendant's *cestui que trust* to set aside as void and fraudulent various transactions, among them the one out of which the alleged assignment which is the basis of this complainant's cause of action arose. It is instructive to note in this connection that following a decision of the Appellate Division of the State of New York, *Wetzlar* v. *Wood*, 143, New York Appellate Division Reports, page 313, the assignment in suit here, has upon the new trial therein ordered been declared void for usury. It is the intention of this defendant to account as soon as the appeal, taken by the defendants in that action, has been decided; for until a final decision has been rendered the questions arising upon an accounting would probably, as a matter of comity, be left undetermined by the Surrogate.

This does not mean that the statement on page 12 of Appellant's brief:

> "The only possible remedy, if defendant's contentions are to prevail, would be proceedings to enforce the filing of an account, but, in accordance with the Surrogate's practice

> in New York, a disputed question of distribution cannot be determined by the Surrogate. When such question arises, the Surrogate directs the holding of the fund until the suit be determined in an appropriate court of equitable jurisdiction. (*Matter of Randall*, 152 N. Y., 508; *Matter of Schnabel*, 202 N. Y., 135),"

is a correct exposition of the present New York law, for by Section 2472a of the New York Code of Civil Procedure, added by Chapter 576, Laws of 1910, and which went into effect September 1st, 1910,

> "The Surrogate's Court has also jurisdiction upon a judicial accounting or a proceeding for the payment of a legacy to ascertain the title to any legacy or distributive share, to set off a debt against the same and for that purpose ascertain whether the debt exists, to affect the accounting party with a constructive trust, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter. He must order the trial of any controverted question of fact of which either party has constitutional right of trial by jury and seasonably demands the same."

This has been construed by the Surrogate's Court of New York County in *Matter of Thornburgh*, 72 Miscellaneous Reports (N. Y.), page 619, the Court holding:

> "Under the language of section 2472a, Code Civil Procedure, added by chapter 576, Laws of 1910, it would appear that the Surrogate has jurisdiction upon a judicial accounting to ascertain the title to any legacy or distributive share, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter.

> It may be conceded for the moment, without extended inquiry, that, prior to the year 1910 and the act mentioned, the Surrogate had no jurisdiction to try the validity of assignments of the interests of legatees on the judicial settlement of the accounts of an executor" (at page 620).

The Court citing many cases, including *Matter of Randall* cited by appellant.

Matter of Schnabel (*supra*), the only other authority cited by appellant in support of his version of the law is clearly not in point.

To begin with the proceedings there were commenced before Section 2472a of the New York Code of Civil Procedure (*supra*) went into effect, and furthermore, and what is more pertinent to the question, the question in that case was not as to the validity of any legacy or the authority of the Surrogate "to set off a debt against the same and for that purpose ascertain whether the debt exists" (Sec. 2472a *supra*), but was merely a contest between the accounting party and a contending creditor respecting property alleged by the creditor to belong to the estate, and by the administratrix to be her personal property.

POINT V.

The bill was properly dismissed.

A. THE PLEA BEING A NEGATIVE ONE, THE BURDEN OF PROOF AS TO THE ISSUE RAISED BY THE REPLICATION WAS UPON THE COMPLAINANT.

It is to be noted here that nowhere in appellant's brief is the contention raised that defendant's plea

is an affirmative one. No answer is made to the opinion of the Court below that the plea is a negative one, and the burden of proof was therefore upon the complainant. Instead the point is first raised that the Court should have presumed that it had jurisdiction from the mere averments of jurisdictional facts in the Bill, although these facts were never supported by actual proof, and were specifically put in issue by the defendant. It follows from what has been said (*ante*, Point IV, sub-division A, page 8 *et seq.*) this is palpable error; that the Court's jurisdiction having been put in issue, it was absolutely essential that proof be furnished it that it had the authority to proceed with the cause, and the question is upon whom did this burden of proof lie.

It is very true, as contended by this complainant, that if matter *dehors* the bill is set forth in a defendant's plea, the burden of proving its truth is upon the defendant, and no cases need have been cited by complainant to support the self-evident proposition that if a defendant pleads *new matter* in abatement, the burden of proving this new matter is upon the defendant.

This defendant contends, however, that his plea did not set forth any new matter *dehors* the Bill; that his plea simply denied the material and essential allegation of complainant's Bill, the one fact upon which the jurisdiction of the Court was based, viz.: that the defendant owned and held property within the territorial jurisdictional limits of the Court, and that this was a fact which complainant was bound to prove to the satisfaction of the Court before it could assume jurisdiction.

In other words, defendant contends that his plea is strictly a negative one, and that the law is set-

tled that where a plea merely denies a particular allegation in the Bill and does not set forth matter *dehors* the Bill, that the plea is a negative one, and that the burden of proving the issue raised by the replication, the burden of proving the material fact necessary for the Court's jurisdiction to fasten, is upon the complainant.

Street's Fed. Eq. Pr., Sec. 896;
Vacuum Oil Co. v. *Eagle Oil Co. of N. Y.*, 154 Fed. Rep., 867; affd. in 162 Fed. Rep., 671,
Oregon R. & Nav. Co. v. *Shell*, 143 Fed. Rep., 1004.

In *Vacuum Oil Co.* v. *Eagle Oil Co., supra,* the Court saying:

> "The complainant insists that the pleas are affirmative, and that therefore the burden of proof rests upon the defendant. An affirmative plea is one that sets up some matter *dehors* the bill. A negative plea denies some material allegation in the bill. In the former case the burden of proof rests upon the defendant; in the latter upon the complainant" (p. 869).

Indeed this question is expounded so well in the opinion of the Court below (Record, p. 48), and so little controverted by complainant, that defendant will not take up the time of this Court in any further discussion of this point other than by quoting definitions of an affirmative and a negative plea which it is respectfully submitted are peculiarly apropos. Both of those definitions being taken from Street's Fed. Eq. Pr., which in turn quotes them from Gibson's Suits in Chancery (2nd Edit.), Sec. 323.

Sec. 837, *Affirmative Plea*,

"The logic of an affirmative plea in bar is this: the complainant having omitted from the bill an essential matter of fact, which, if it had not been omitted, would have rendered the bill demurrable, the defendant may, by bringing this omitted essential matter of fact before the Court, destroy the apparent case contained in the bill, and in this way terminate the litigation quickly and cheaply. Thus, a bill may show on its face a good cause of action, setting up many details, and praying for relief. If, however, the bill suppresses the fact that there has been a payment or a release, or a former adjudication, or that the suit is barred by the statutes of limitation, or that any other statutory or equitable defense exists, in any such case the defendant may set up this suppressed fact by a plea in bar, and thereby end the suit."

Sec. 838, *Negative Plea*,

"A negative plea in bar denies some essential allegation contained in the bill, some averment on which the case rests; and the logic of the plea is: that, inasmuch as the complainant's alleged rights all depend on a false allegation of a single essential matter of fact, it is unnecessary for the defendant to answer all the various charges and averments in the bill, when the suit can be ended by a plea denying the allegation of this one essential matter of fact. A negative plea in bar is the opposite of an affirmative plea; an affirmative plea in bar seeks to bring into the case an essential matter of fact which the bill has left out, while a negative plea seeks to strike out of the case an essential matter of fact which the bill has brought in. In other words, an affirmative plea seeks to end the suit by injecting into it a vital fact, and

> a negative plea seeks to end the suit by extracting from it a vital fact. It is plain, that both affirmative and negative pleas in bar are really nothing more than short, pointed answers, intended to confine the litigation to a single issue, that, if decided in favor of the defendant, would end the suit."

B. THE PLEA HAVING BEEN PREVIOUSLY ADJUDGED SUFFICIENT IN POINT OF LAW, AND BECAUSE OF THE FAILURE OF THE COMPLAINANT TO OFFER PROOF CORRECTLY DECREED TRUE IN POINT OF FACT, NOTHING REMAINED FOR THE COURT TO DO BUT TO DISMISS THE BILL.

As the rule is laid down in Street's Fed. Eq. Pr., Sec. 904:

> "So, if a plea is first set down for argument on its sufficiency and held good and then a replication is put in and on proof the plea is found to be true in point of fact, nothing remains to be done but to dismiss the bill. The defendant cannot again controvert the legal sufficiency of the plea (*Eccleth* v. *Southern Cal. Ry. Co.*, 123 Fed. Rep., 836; *Hartz* v. *Cleveland*, 95 Fed. Rep., 681.)"

or as the Court said in *Eccleth* v. *Southern Cal. Ry. Co.*, 123 Fed. Rep., 836 (*supra*):

> "The sufficiency of the plea itself has already been established by the judgment heretofore rendered herein, and if the proof establishes the truth of the facts pleaded nothing remains to be done but to dismiss the bill. That the proof does establish the truth of the matters pleaded in bar of the suit is clear, and, indeed, does not seem to be seriously controverted. It results that the plea must be sustained, and the bill dismissed, at

the complainant's costs. It is so ordered" (at p. 838).

POINT VI.

The Bill is defective and should have been dismissed irrespective of any question as to proof, for the Court was powerless to grant the relief prayed for.

As noted in Point IV these and other questions raised by the defendant were not passed upon by the Court below, as being unnecessary in view of its decision.

A. THE BILL DEMANDS THAT COMPLAINANT BE DECREED ENTITLED TO THE IMMEDIATE POSSESSION OF THE PROPERTY IN SUIT, WHICH THE COURT COULD NOT DECREE.

The Court, sitting as a court of equity, could not assume jurisdiction in a case where it was in no position to enforce its decree.

As is well stated in 16 Cyc., p. 118:

> "Courts exist for the enforcement of rights, not the determination of academic questions. This principle denies to a court of equity cognizance of any suit where its decree would be ineffectual because of territorial limits to the reach of its process."

and at page 125:

> "As equity is without jurisdiction where its decree would through absence of the parties or subject matter be ineffectual."

So that if the Court had assumed jurisdiction herein and the cause had proceeded to a decree, there would have been no way of enforcing it, and the parties would be in the same position as they are to-day. For, as stated in *York County Savings Bank* v. *Abbot*, 139 Fed. Rep., 988:

> "Therefore our jurisdiction, as we have said, still rests entirely on the eighth section of the Act of March 3, 1875, and must be supported by it if at all. Our powers, therefore, do not go beyond what is provided for by that act, so that we have none except to dispose of what may well be called the *res*, and therefore none to issue a personal decree against Martha T. Abbot which would be effectual in law. Consequently, notwithstanding the views which we have heretofore expressed, if the case before us is of such a character that the lien which may be ultimately decreed cannot be made effectual except by some personal act of the respondent which we have not the power to compel, it is too plain to need discussion that the matter of our jurisdiction must be determined by an examination of the underlying question whether we are able to give an effectual remedy in every view of the form which the ultimate determination of the merits may take" (p. 991).

Furthermore, while it is true that all complainant now says he asks is "a decree establishing '*his title*' to property." (Appellant's brief, p. 9.)

That he did not seek "(b.) a decree purporting to attach personal property within the district" (*id*, p. 9).

> "Complainant is not seeking to obtain such a decree" (*id*, p. 12).

The fact remains that by paragraph "Seventh" of his Bill, complainant alleges

> "That by virtue of the said sale had at auction and the conveyance made to your Orator thereof, your Orator *became vested with and is entitled to immediate possession* of the said one-third of one-sixth of the residuary estate," (Record, p.).

and in his prayer for relief, complainant demands,

> "* * * that your Orator may be declared entitled to the *immediate possession* of one-third of one-sixth of the residuary estate of Gustave J. Wetzlar, deceased, and also to payments of income of the said one-third interest from August 23, 1908, and may pay your Orator the said portion of the said share of Julius G. Wetzlar as may be found to have been unlawfully withheld or diverted from him" * * * (Record, p. 7).

This, complainant now admits the Court could not decree. (Appellant's brief, p. 9.)

For while a non-resident claimant against an estate is not limited to his remedies in the State probate courts, but may, in certain cases, bring an action in the Federal Courts, he cannot, as complainant now concedes, issues execution under a judgment thus obtained, or secure or otherwise adjudge any property of the estate, but must come in and share with the State creditors.

The law being well settled that a claim adjudicated by the Federal Courts against the estate of a deceased person, must take its place and share in the estate as administered by the State probate court, and cannot be enforced by process directly against the property.

Byers v. *McAuley*, 149 U. S., 608-620;
Yonley v. *Lavender*, 21 Wall., 276.

and the following cases cited by appellant.

In all of these cases the defendants were properly before the Court, either by service of process upon them within the district, or by voluntary appearance, or the Court had jurisdiction of the cause by reason of the property being within the district. *A fortiori*, no process can issue in the case at bar, where none of these essentials exist.

This, however, does not seem to have deterred complainant from citing this entire line of cases as authorities, purporting to hold that the Court below should have sustained his Bill, although the most cursory examination of the cases shows that in every one of them the Court had either jurisdiction of the person of the defendant, or that the property was actually and physically within the territorial jurisdictional limits of the Court, and although neither of these essentials are present in the case at bar.

Thus *Ingersoll* v. *Coram*, 211 U. S., 335, cited on pages 8, 11, 12 and 24 of appellant's brief, where the property was within the district, and no objection was made by the defendants as to the jurisdiction of the Court over the parties, and where this Court expressly said:

> "It makes no difference how the parties were served or brought in. Being in, all objections to the bill should be made" (at page 355).

and at page 356:

> "They [the defendants] did not answer as to the jurisdiction of the Court as to par-

> ties, as to the rights of the parties to be sued in district of their residence. The latter objection may be waived, and is waived by not being made."

Byers v. *McAuley*, 149 U. S., 608, cited on pages 8 and 11 of appellant's brief, where the property was within the district, and this Court said:

> " * * * Where property is in the *actual* possession of one Court of competent jurisdiction, such possession cannot be disturbed by process out of another court. This doctrine has been affirmed again and again by this Court. (At page 614.)

Payne v. *Hook*, 7 Wall., 425, cited on pages 8 and 11 of appellant's brief, where the property was within the district, the estate funds in question being in the possession of the public administrator, to whom it had been committed by the Probate Court.

Waterman v. *Canal-Louisiana Bank Co.*, 215 U. S., 33, cited on page 8 of appellant's brief, where the property was within the district, and the Court had jurisdiction over all the numerous defendants with the exception of one "Frederick Tilton Davis, averred in bill to be a resident of the State of Alabama and outside of the jurisdiction of the Court" (page 47), but whose presence the Court found "not essential to the jurisdiction of the Federal Court to proceed" (page 49), and the lower Court was therefore directed to

> "proceed to determine the proportion in which the complainant and the Watermans are entitled to share, *without prejudice to the rights of Davis. It may direct the retention of his share in the hands of the ex-*

> *ecutors, to be adjudicated in some other suit* * * *" (at pages 49 and 50). (Italics ours.)

In other words, the Court expressly refused to adjudicate as to a defendant over whom it had no jurisdiction.

Brown v. *Pegram*, 143 Fed. Rep., 701, cited on page 13 of appellant's brief, in which Mr. Burr, counsel for present complainant, was one of the counsel, and from the quotation of page 14, of which it appears that the property there in dispute, and the title to which was there adjudicated, was physically "within this district." The opinion of the Court, commencing as follows:

> "Arthur K. Brown is a Receiver of this Court, and has a fund of $40,000 *within the jurisdiction* * * *"

Complainant's contention that the property in the case at bar should be

> "regarded in the eye of the law as in the possession of the Court approaching the executor" (appellant's brief, p. 11)

is considered elsewhere in this brief (ante, Point IV, sub-division B, pages 18 and 19).

B. THE DEFENDANTS ARE SUED AS INDIVIDUALS, WHILE THE PROPERTY SOUGHT TO BE AFFECTED IS HELD BY THEM AS EXECUTORS.

The bill is filed to enforce an equitable lien upon, or claim to, personal property alleged to have been within the jurisdiction of the Court and in the possession of the defendants *as executors*.

A mere reading of the bill, considering not only the title but the entire bill as well, is sufficient to

show that the defendants are sued as *individuals*. There is, however, no allegation in the bill that the defendants, *as individuals*, hold any property which is the subject of the suit; by the very terms of the statute under which jurisdiction is sought, therefore, the Court was without jurisdiction:

> "* * * said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit. * * *" Sec. 738, *supra*.

So that, even if the property were within the jurisdiction, still the Court could not have adjudicated upon it, as it could not enforce a claim against property held by the defendants *as executors*, in a suit against them *as individuals*.

> *Leonard* v. *Pierce*, 182 N. Y., 431;
> *First National Bank* v. *Shuler*, 153 N. Y., 163;
> *United Press* v. *Abell Co.*, 73 App. Div., (N. Y.), 240.
> *New York Code Civ. Proc.*, Sec. 1814,

which is as follows:

> "An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be

> enforced against the property of the decedent, except by the special direction of the Court, contained therein."

In *Leonard* v. *Pierce*, *supra*, the New York Court of Appeals, at page 432, saying:

> "It has been repeatedly held that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual, and consequently a former judgment concludes a party only in the character in which he was sued. If the judgment was for or against an executor, administrator, assignee or trustee, it would not preclude him, in an action affecting him personally, from disputing the findings or judgment, although the same questions are involved (*Collins* v. *Hydorn*, 135 N. Y., 320; *Landon* v. *Townsend*, 112 N. Y., 93-99; *Rathbone* v. *Hooney*, 58 N. Y., 463-467)."

and citing with approval its decision in *First National Bank* v. *Shuler*, *supra*, where it said, at page 173:

> "But a suit against one sued as an individual does not bind him as trustee, and, conversely, judgment against one sued in a representative capacity does not conclude him in a subsequent action brought by, or against, him as an individual, although the same identical issue is involved, and the decision in the first action was upon the merits (*Rathbone* v. *Hooney*, 58 N. Y., 463; *Landon* v. *Townshend*, 112 N. Y., 93; *Collins* v. *Hydorn*, 135 N. Y., 320)."

POINT VII.

The plea not being interposed by defendant for the purpose of delay or vexatiously, if the plea is overruled by this Court, defendant should be granted permission to answer complainant's Bill.

It is to be noted that no testimony was taken, and that the facts set forth in the plea were not found to be false as a matter of fact.

Considering, therefore, the nature of complainant's Bill, the collateral assignment therein set forth, which is now sought to be enforced as an absolute demand for one-third of the interest of a young man in his father's estate, which said interest amounts to one-half of a trust fund amounting, as found by the New York Supreme Court, to $134,000. *Wetzlar* v. *Wood and Wetzlar* v. *N. Y. Finance Co.*, 143 App. Div., Rep. (N. Y.), 311, at p. 312, it is respectfully submitted that if the plea be overruled, defendant be permitted to file his answer, so that the merits, or rather the lack of merit, of the complainant's cause of action be adjudicated.

Defendant has done nothing contrary to the spirit or the letter of the law, and with all due respect to counsel for the appellant, the statements in appellant's brief

> "The plea attempts to set up a set of facts in violation of the law. The defendant, it

> is said, has '*gone*' to Germany, etc." (p. 24).
> "* * * unless actual embezzlement be proposed on the part of the defendant" (p. 13).

are hardly fair to the defendant, an old German banker of international repute. What act has he committed in "violation of the law"? He has never "*gone*" to Germany. Complainant's bill specifically states that defendant is an alien subject of the Emperor of Germany, and a resident of Frankfort-on-the-Main, Germany (Record, p. 2). He has lived there all his lifetime, and has never been a resident or citizen of the United States; the testator Gustave J. Wetzlar, knew these facts, and his Will expressly authorized defendant to remove any of the trust funds without the State of New York.

> "FIFTEENTH. I authorize and empower the trustee or trustees for the time being under any clause of this my Will in their, or her, or his discretion, to remove from the State of New York at any time any property which shall at the time being form a part of any of the trust estates held by such trustee or trustees, and I likewise authorize and empower the guardian or guardians of the person and estate of each of my children during his minority in their, or her, or his discretion, to remove the personal estate of such child from the State of New York" (Record, p. 19-20).

And such was testator's confidence in the trustees named by him that the Will further provides:

> "TWELFTH. I hereby authorize and fully empower the trustees of this my Will appointed by the several trusts by the preceding articles of this my Will created, or the sur-

> vivor or survivors of them, to invest the whole or any portion of the principal of either or any of such trust estates in real or personal property in the United States or elsewhere, at their discretion and in such securities, bonds, stocks or other personal property as in their judgment will constitute judicious investment of the whole or any portion of such trust fund, not confining them or the survivors of them to such investments as trustees are by law only authorized to make, but having confidence in their good judgment and in their integrity. I do hereby authorize and empower them and the survivor of them to make whatever investment of such trust funds of any sort or description they or the survivors of them may deem advisable to make, and I do hereby will and direct that the said trustees and the survivor of them shall in no case be accountable or chargeable for any loss if any that may happen to such trust funds or to the funds of either of said trust estates by reason of any such investments made by them or the survivor of them in good faith" (Record, pp. 18-19).

The defendant, having therefore acted in all things in good faith, it is respectfully submitted that should this Court overrule his plea, permission should be given him to answer pursuant to Equity Rule 34:

> "If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to

> answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly."

As pointed out in the opinion of the Court below (Record, p. 48), *Kennedy* v. *Creswell*, 101 U. S., 641 (1879), cited and quoted by appellant on page 20 of his brief as "singularly close to the case at bar" is based on entirely different facts. There the plea was an affirmative one; here it is a negative one. There evidence was offered by the complainant, and none by defendant; here no evidence was offered by either party. So that to say the least

> "The difference of procedure in that case and in the case at bar is at once perceivable" (Record, p. 48).

And appellant practically admits this on page 20 of his brief, where he qnotes from the Court's opinion in *Kennedy* v. *Creswell* (*supra*).

> "If a defendant pleads a false plea, *and it be so found*, what is next to be done?" (Opinion of Court, at p. 644.)

For in the case at bar it has never been "*so found*"; and as noted in Street's Federal Equity Pr., Sec. 905, in further explanation of *Kennedy* v. *Creswell*, *supra*:

> "It is to be observed of this case that it came up from a Court of the District of Co-

> lumbia, and the equity rules promulgated by the Supreme Court are not effective in that jurisdiction. Consequently, the discussion in this case must be construed in reference to the general principles of equity practice and not with reference to practice in the Circuit Courts under the equity rules" (at p. 547).

Or as the Court said in

> *Westerrelt* v. *Library Bureau*, 118 Fed. Rep., 824,

cited on page 23 of appellant's brief:

> "Neither can the complainants derive any help from *Kennedy* v. *Creswell*, 101 U. S., 641, which they urge on us so strongly, because that case originated in the Courts of the District of Columbia, to which the equity rules of the Supreme Court do not apply. The discussion in that opinion is with reference to the ordinary equity practice, and without any allusion to Rule 34. It is plain beyond argument that in the two cases above cited [*Farley* v. *Kittson*, 120 U. S., 303; *Dalzell* v. *Ducher Mfg. Co.*, 149 U. S., 315], the Supreme Court, without hesitation, although, it is true, without explanation, interpreted Rule 34 as the Circuit Court interpreted it." (At page 826.)

Appellant's contention that:

> "The use of the word 'overruled' in Equity Rule 34, shows that it applies only to the overruling of a plea for insufficiency in law, putting it in the same class as a demurrer" (Appellant's brief, p. 22),

is clearly error, for as pointed out in Street's Fed. Eq. Pr., Sec. 907:

" * * * It will be noted that Rules 33 and 34 are cognate rules. Both contemplate the disposition to be made of demurrers and pleas. As to pleas, Rule 33 provides that they may be set down for argument or may be tried on the issue of fact. It also states the effect to be given to the plea when it is found to be true in fact. As to the effect to be given to the plea when it is found not to be established by proof, Rule 33 is silent. That matter was apparently left to be dealt with in the next rule. Accordingly, in Rule 34 we find this language: 'Upon the overruling of any plea, the defendant shall be assigned to answer the bill.' In the technical language of equity practice 'overruling' a plea is generally understood as referring to the overruling of a plea on argument of its sufficiency, and not as referring to the situation where the plea is disproved and overruled for that reason. It is, however, probable that the word is not here used in any such restricted and technical sense. Rule 34 apparently applies not only to the hearing of demurrers and pleas when the same are set down for argument, but also on the hearing of plea on the issue of fact. If anything else were intended, it would have been easy to qualify the word 'hearing' by limiting it to 'hearing on argument.' Besides, if the rule does not extend to a hearing on the issue of fact, why should the expression 'in point of law or fact' be used in dealing with the question of costs? The interpretation whereby the rule is understood to apply not only to the hearing on argument but also the hearing on the issue of fact, brings the rule into harmony with the second branch of Rule 33, and establishes the principle as regards the *overruling* of a plea on the issue of fact similar to that started in Rule 33 as

regards the *sustaining* of the plea on the issue of fact. That is, the original principle of equity practice is changed as to both. The plea in other words is not now necessarily conclusive in either alternative. If the defendant prevails on the issue of fact, the plea avails him under Rule 33 only so far as, in law and equity, it ought to avail him; if the plaintiff prevails on the issue of fact, the defendant is, under Rule 34, permitted to answer. This is the reasoning which clearly underlies the practice sanctioned in those two cases. [*Farley* v. *Kittson*, 120 U. S., 303 (1887); *Dalzell* v. *Dueber Mfg.*, 149 U. S., 315 (1893)] by the Supreme Court."

In *Westerrelt* v. *Library Bureau*, 118 Fed. Rep., 824 (*supra*), proofs were actually taken and the Court found the fact in dispute in favor of the complainant and against the defendant. Leave, however, was granted defendant to answer complainant's bill upon his plea being overruled, the Court saying:

"* * * we are compelled to accept the action of that Court in *Farley* v. *Kittson*, 120 U. S. 303, and in *Dalzell* v. *Mfg. Co.*, 149 U. S. 315, as conclusively sustaining the order of the Circuit Court now appealed against. The attempted explanations by the complainants of these decisions are in no way satisfactory." (At pages 825 and 826.)

And the Court referring to Bates Fed. Eq. Procedure, Vol. I., page 360, cited on page 23 of appellant's brief, said:

"* * * The author proceeds, at page 361, to discuss the effect of falsifying a plea, and he

> gives the English chancery practice without any reference to Rule 34. In this connection he makes no reference to the decisions of the Supreme Court, which we must accept as decisive of the construction of this rule. Therefore we can give no weight to his discussion, so far as the question now before us is concerned." (At page 825.)

So that the statement in appellant's brief:

> "The Court further point out that in the language of equity practice 'overruling' a plea means setting it aside on a question of law, and that Bates in his Federal Equity Procedure (Vol. I, page 360), states that the usual equity practice has not been altered by Rule 34, where defendant has staked his case on an issue and lost." (at p. 23.)

is, to say the least, a palpable error, for what the Court actually said is:

> "1. Bates Fed. Eq., Procedure, Vol I, page 360, affirms that Rule 33 has changed the practice of the Federal Courts from the old Chancery practice; but this rule relates only to instances where the complainant has hazarded his case on the issue raised by the plea, and has lost. The author proceeds on page 361, to discuss the effect of falsifying a plea, and he gives the English Chancery practice *without any reference to Rule 34*. In this connection he makes no reference to the decisions of the Supreme Court, which we must accept as decisive of the construction of this rule. Therefore we can give no weight to his discussion, so far as the question now before us is concerned." (At page 825.)

All of which is respectfully submitted.

HOWARD S. GANS.
Solicitor appearing specially for for the defendant, Emil Wetzlar, for the purpose of this plea, and for no other.
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